No. 17245

In the United States Court of Appeals for the Ninth Circuit

ROBERT W. MORGAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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CITATIONS

247-738—67——1

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OPINION BELOW

No opinion was written by the District Court in connection with the original proceedings. On May 17, 1965, the District Court filed a memorandum opinion denying appellant's petition for a writ of habeas corpus but modifying the sentence under Rule 35. This opinion is included in the Supplemental Record filed in this Court on June 4, 1965.

JURISDICTION

This is an appeal from a judgment of conviction for using a false document, in violation of 18 U.S.C., Section 1001 and for theft by false pretenses, and conversion, of a Treasury check for $441.11, in violation of 18 U.S.C., Section 641, as charged in Counts I and II, respectively, of an indictment returned in the Northern District of California, Southern Division, on September 21, 1960. The subject matter of these counts was appellant's 1955 income tax return and the refund check issued thereon.

After a jury trial which began on November 7, 1960, appellant was found guilty on Counts I and II, and on December 22, 1960, was sentenced to the following sentence (1 R. —): [1]

> IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count ONE and FIVE (5) YEARS on Count TWO. These sentences shall run concurrently with each other and consecutively to any period of actual confinement under the sentence or sentences of imprisonment now being served, by the defendant in the California State Prison, and will commence at the expiration of such confinement by any parole or release from such confinement, conditional or otherwise. This sentence however is imposed under Title 18 U.S.C. Section 4208(a)(2) and the defendant will be eligible for parole at any time.

A modification of sentence entered on May 17, 1965 by the District Court added the following language to the sentence (1 R. —):

> Nothing in this judgment is intended to contravene the provisions of 18 U.S.C. Section 3568.

Notice of Appeal was filed on December 22, 1960. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the Northern District of California, Southern Division, was a proper district in which to lay venue and to prosecute appellant for "using" a false document, in violation of 18 U.S.C., Section 1001, and for theft by false pretenses of the tax refund check, where the proof showed that appellant's 1955

[1] Volume No. 1 of the initial 13-volume record filed in this Court is not paginated and will be referred to simply as Volume No. 1 (1 R.—). Volumes II to XIII, inclusive, are reporters' transcript of pretrial and trial proceedings and will be referred to by volume and page, e.g., 3 R. 5. Supplemental records certified to this Court will be referred to by date and page, e.g., 1 Supp. R. 22 (filed on September 22, 1960).

tax return was mailed in the Northern District of California, at Folsom Prison and filed with the District Director of Internal Revenue at San Francisco, and that the tax refund check was issued at San Francisco, and mailed to appellant at Folsom Prison and thereafter transmitted by him through the mail to Los Angeles, California, where at his request, it was endorsed and deposited in the account of an attorney who thereafter remitted $200 of the proceeds back to appellant at Folsom Prison. (Covering appellant's assigned errors 1 and 10, Br. 4–9, 48.)

2. Whether denial of a continuance beyond November 7, 1960, was an abuse of discretion. (App. No. II, Br. 9–17.)

3. Whether the proof is sufficient to sustain the verdict that appellant was guilty of filing a 1955 tax return which falsely represented the taxpayer's Social Security number, the wages earned, the taxes withheld, his marital state, and the rightful number of exemptions. (Reply to App. Nos. III and VIII, Br. 18–19, 46.)

4. Whether denial of appellant's motion to quash Government exhibits in the form of two letters by appellant to a Los Angeles attorney transmitting his tax refund check and giving instructions as to its disposition (Pltf. Exs. 7 and 11), was an abuse of discretion, or denied appellant the protection of the attorney-client privilege (App. Nos. IV and VI, Br. 20–24, 36–41).

5. Whether production of appellant by the warden of Folsom Prison, where appellant was then serving an uncompleted sentence for state offenses, to the United States District Court under a writ of habeas corpus ad prosequendam for the purpose of prosecution on the pending federal indictment, worked a termination of the state sentence. (App. No. V, Br. 25–35.)

6. Whether the District Court erroneously denied a mistrial demanded by appellant on the ground of prejudice allegedly resulting from entry of a guilty plea by co-defendant Davenport, which was entered out of the presence of the jury. (App. No. VII, Br. 42–45.)

7. Whether due process has been denied to appellant because of the length of time in which this appeal has been pending. (App. No. IX, Br. 47.)

STATUTES INVOLVED

18 U.S.C.:

SEC. 641. Public money, property or records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

SEC. 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

1. The allegations of the indictment

In this indictment of 12 counts (1 R. —) appellant was the sole defendant named in Counts I and II. He was also tried on Counts III and VI, upon which the jury were unable to agree and which were dismissed on February 6, 1961. Appellant was charged jointly with co-defendant Davenport in Counts III and

IV, and with co-defendant Escarrega in Count IX and with co-defendant Holley in Count XII. Defendant Davenport was the sole defendant in Counts VII and VIII. Defendants Escarrega and Holley were the sole defendants named in Counts X and XII, respectively. Counts IX, X, XI and XII were severed on November 7, 1960, and at that time, the case proceeded to trial as to appellant and co-defendant Davenport on Counts I to VIII, inclusive. Davenport entered a plea of guilty to Count VII on November 9, 1960, and the trial continued thereafter with appellant, the sole defendant on trial.

All defendants named in the indictment were California State Prison inmates at the time of the offenses alleged.

Count I charged that on or about March 11, 1956, appellant, at San Francisco, in the Northern District of California, knowingly and willfully used a false document in a matter within the jurisdiction of the United States Treasury Department. This document was an income tax return alleged to contain knowingly false statements that appellant had received $2,150.50 in wages from one Lowell Lyons, Jr., in 1955, that $473.11 in taxes had been withheld therefrom, and that he was entitled to three exemptions, in violation of 18 U.S.C., Section 1001.

Count II charged that in reliance upon these same false representations, the Treasury Department issued appellant a tax refund check of $441.11 which appellant, by such false pretenses, did steal and convert during the period March 11, 1956 to September 11, 1956, in San Francisco, and at Folsom, California, in violation of 18 U.S.C., Section 641.

Count III charged appellant and co-defendant Davenport with conspiring with each other and certain other named co-conspirators to defraud the United States of America and commit offenses revolving around preparation and filing of false withholding statements and tax returns for various prison inmates. The jury disagreed on this count, which charged a violation of 18 U.S.C., Section 371.

Count IV charged appellant and co-defendant Davenport with another conspiracy involving tax returns in the names of two inmates not specified in Count III, in violation of 18 U.S.C., Section 371. This Count was dismissed on motion on November 21, 1960.

Counts V and VI charged appellant in relation to false tax refund claims submitted in the names of one Nelson, and one Hayes, respectively, both in violation of 18 U.S.C., Sections 2 and 287. Count V was dismissed on November 28, 1960, and the jury disagreed on Count VI.

Counts VII and VIII charged only Davenport, alias King, with offenses relating to tax returns of inmate Hayes (Count VII) and of himself, filed under the name W. H. Reith (Count VIII). Davenport pleaded guilty to Count VII on November 9, 1960, and thereafter, appeared as a witness for appellant. (10 R. 983.)

Count IX charged appellant and Escarrega with a Section 371 conspiracy with each other and others named as co-conspirators, but not defendants, in relation to Escarrega's 1957 tax return, and Count X charged Escarrega with the theft by false pretenses of the tax refund check issued on his 1957 return. Counts IX and X were severed for trial and Escarrega was acquitted on December 8, 1960, after a separate jury trial in which appellant was not a party.

Counts XI and XII charged appellant and Holley, in the pattern of Counts IX and X, in relation to Holley's 1957 return, and Holley was also acquitted after a jury trial with Escarrega.

2. Pre-trial proceedings

Pretrial motions and motions for discovery and continuance will be reviewed and discussed in the context of argument thereon in this brief.

3. The evidence in support of the verdict [2]

Plaintiff's Exhibit 1 in this case is an income tax return Form 1040A for 1955, filled out in the name of Robert E. Morgan,

[2] This statement is confined to evidence relating directly to Counts I and II, and does not encompass evidence relating to Counts III and VI, which consisted chiefly of (1) testimony of a former Folsom inmate, Everette Nelson, as to appellant's activities in preparing false returns for other prisoners (7 R. 387). (2) expert handwriting opinion that appellant signed a return filed in the name of another prisoner, Hayes (9 R. 777–778), testimony that in 1960, appellant proposed a false return scheme to a fellow jail prisoner in Los Angeles, and said he had previously engaged in such transactions at Folsom Prison. (Steinhoff, 8 R. 623.)

P.O. Box A–33442, Represa, California. Appellant's prison number was A33442. (Exs. 63, 64, 65.) Represa, California, is the return address for the mail of all prisoners at Folsom Prison, who list their prison number as a box number on their mail. (11 R. 1153.)

Exhibit No. 1 was filed with and processed by the District Director of Internal Revenue at San Francisco, California, according to the testimony of the supervisor of the returns. Index and Service Unit of that office (Smith, 5 R. 143) and of the Returns Coordinator of that office (Conrad, 11 R. 1157), although appellant in his testimony stated he had mailed it to Los Angeles, from Folsom Prison (10 R. 1011). Internal Revenue Service regulations require that all tax returns bearing the home address of "Represa, California," are to be filed in the San Francisco District Director's office. (11 R. 1152.)[3] This return was assigned the processing number R166332, which is the number thereafter placed on, and only on, the refund check related to that return. (5 R. 144, 150; 11 R. 1151.)

Exhibit No. 2 is a United States Treasury check for $444.11 showing the serial number R166332, dated May 29, 1956, and issued at San Francisco, to Robert E and Goldye Morgan, P.O. Box A–33442, Repressa [*sic*], Cal. It bears endorsements

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[3] "SEC. 6091. PLACE FOR FILING RETURNS OR OTHER DOCUMENTS.

"(a) *General Rule.*—When not otherwise provided for by this title, the Secretary or his delegate shall by regulations prescribe the place for the filing of any return, declaration, statement, or other document, or copies thereof, required by this title or by regulations.

"(b) *Tax Returns.*—In the case of returns of tax required under authority of part II of this subchapter—

(1) *"Persons other than corporations.*—

"(A) *General rule.*—Except as provided in subparagraph (B), a return (other than a corporation return) shall be made to the Secretary or his delegate—

"(i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or

* * * * *

"(B) *Exception.*—Returns of—

"(i) persons who have no legal residence or principal place of business in any internal revenue district."

* * * * *

(26 U.S.C. 1964 ed., Sec. 6091.)

"Robert E. Morgan," "Goldye Morgan," and "Wilber Littlefield," and was deposited on September 11, 1956, in a Los Angeles bank. This tax refund check was issued at San Franciso, and is related by the number R166332 to Exhibit No. 1. (5 R. 144, 153; 11 R. 1156.) Appellant testified that he "would say" he received Exhibit No. 2 from filing Exhibit No. 1, and that he mailed Exhibit No. 2 to one of his Los Angeles attorneys, Wilber Littlefield. (10 R. 1012.)

Wilber Littlefield testified that during the period 1954 to 1956, he had advised appellant about a writ of habeas corpus, and about appeal procedures, but that he had nothing to do with appellant's 1955 tax return (6 R. 206) and rendered no legal services to appellant concerning the latter's rights to the $444.11 check (6 R. 205). Littlefield produced Exhibit No. 7 (6 R. 162) which is a letter dated August 7, 1956, from appellant to Littlefield, enclosing Exhibit No. 2, stating that his wife, Goldye, would be visiting a Mrs. Bertha Warner in September, and instructing Littlefield to deliver the check to Mrs. Warner for the purpose of getting the endorsement of Goldye.

Exhibit No. 11, also produced by Littlefield (6 R. 195) is another letter by appellant to Littlefield dated August 28, 1956, enclosing a copy of appellant's letter of instruction to Mrs. Warner, telling Littlefield to release the check to Mrs. Warner, and stating Littlefield is to receive $200 of the proceeds for his "retainer." Littlefield testified that he received Exhibit No. 11 from appellant (6 R. 225) and thereafter delivered the check to Arthur Warner, and within 24 hours, the check was returned to his office with the endorsement of "Goldeye Morgan" (6 R. 226, 241). Littlefield then deposited the check in his bank account, issued a $244.11 check to Arthur Warner, and retained $200, which he subsequently sent to appellant at Box A–33442, Represa, California (6 R. 221), and which appellant testified he did receive (11 R. 1091).

Arthur Warner was called as a Government witness and on a voir dire examination held to inquire into his possible professional relations with appellant (8 R. 665–693), testified he was admitted to the Bars of New Jersey, the Supreme Court and the Ninth Circuit Court of Appeals, but never licensed to prac-

tice law in California, and that he had been retained by appellant to look into alleged violations of appellant's civil rights.

In jury proceedings, Warner testified that in August, 1956, he lived with his mother, Bertha Warner, in Los Angeles (8 R. 665) and that about August 28, 1956, a Government check for several hundred dollars and made out to Robert and Goldye Morgan was in his possession, but he did not know if it was Exhibit No. 2 (8 R. 729). He stated that Goldye Morgan did not spend the month of September, 1956, with them, that he had never seen her, and that he did not have Exhibit No. 2 endorsed with her name, or recognize the handwriting on the endorsement. (8 R. 734, 742, 744.) He mailed that check back to Littlefield, who in turn sent Warner a check for "several hundred dollars." (8 R. 730–731.) Warner retained a portion of the Littlefield check to cover a debt of $50 to $100, and sent payments to appellant in sums of $15 or $16 per month. (8 R. 731, 734.)

A handwriting expert testified that the "Robert Morgan" on the endorsement of Exhibit 2, as well as the signature on the tax return (Ex. 1), were written by appellant. (9 R. 767.)

Appellant's 1955 tax return (Ex. 1) was filled out in the name of Robert E. Morgan, Social Security No. 535–12–5229, claiming exemptions for himself a wife (Goldye Morgan), and for George Weisbart, represented to be an "uncle" who lived in taxpayer's home and who did not have a gross income of $600 or more in 1955. The taxpayer listed $2,150.50 in wages received from Lowell Lyons, Jr., 229 No. Broadway, Los Angeles and withheld income taxes of $473.11.

Social Security No. 535–12–5229 is the number of one Roland Esperson, of Sumner, Washington, according to Exhibit No. 88. (12 R. 1166.) Appellant testified he could not recall if this number had been issued to him, but that he was not employed in Washington in 1955, and that he could not recall if his Social Security Number was 501–18–6307 in 1942, when he worked in Minnesota, for the St. Paul Packing and Fuel Company, his brother's business. (12 R. 1195–1196.)

Mrs. Goldye Michelson testified that she had not communicated with appellant during the period 1953 to 1960 (6 R. 192) and that she was divorced from him on December 10,

1953 (6 R. 186), as appears in Exhibit No. 10, a decree of the District Court of Gonzales County, Texas. She said her appearance as a witness was her first visit to California (6 R. 189) and she did not know a Mrs. Bertha Warner (6 R. 189). She was not supported by appellant in 1955. (6 R. 187.) She did not endorse Exhibit No. 2 and never saw it before. (6 R. 189.)

Appellant testified that when he listed himself as divorced on a prison form in July, 1955, he was not aware of the "legal aspect" of the divorce and that he was later informed by attorneys that he was still legally married to Goldye, and that he felt he was still married to her, because she committed a fraud on the court by misstatements as to service of process and appellant's whereabouts. (10 R. 1007–1008; 11 R. 1082–1083, 1087.) He testified that he had not seen or supported her since 1953 (11 R. 1074) and that he listed her on the joint return, because he assumed she was not going to file her own return when she did not answer his letter of inquiry whether she was going to do so (11 R. 1073–1075). He said he wrote attorney Littlefield that Goldye would visit Mrs. Warner for a month in order to assure Littlefield that the Warners were all right, and that this was a false statement to Littlefield. (11 R. 1088–1089.)

Mrs. Peggy Weisbart testified that in 1955, she was married to, lived with, and was supported by her husband, George Weisbart, who died in 1960. (6 R. 169–170.) He filed a tax return for 1955 (6 R. 170), which was admitted as Plaintiff's Exhibit No. 84 (11 R. 1140) and shows a reported income of $1,473.95 from the Yellow Cab Company, and lists exemptions for himself, a wife and three children. At one time, Mrs. Weisbart's husband had worked for Lowell Lyons, Jr., 229 North Broadway, Los Angeles, and her husband had known appellant, who had written to her husband in 1955 or 1956, in envelopes which bore a return address of Robert Morgan, Represa, California. (6 R. 169, 171, 174.) One such letter contained a form to be filled out so that the prisoner could receive mail, but her husband threw this form away and did not execute it. (6 R. 174–175.)

Appellant testified as follows with respect to George Weisbart (10 R. 1010–1011):

* * * * *

Well, George Weisbart is a man who at one time was employed, up until, I think, 1955, with Mr. Lowell Lyons on special leg work, detailed investigation, etc., and he was a sick man. He was—I don't know how to phrase it—he was the hanger-on character, and so forth. He was a—he had a bad drinking habit and I used to take care of the man and I considered him on a relationship, such as an uncle, although he was not a blood uncle of mine, but it was a term that we commonly used.

I paid his rent sometimes at 1144 Cornwell with the lady that he was living with who represented herself as Mrs. George Weisbart. However, from both Mrs. Weisbart and Mr. Weisbart, they were never married. I took care of more than half of his income, his expenses, etc., and I thought that it was a legal liability to me to deduct him on my income tax. I did not know that he had died, though, until the other day, or I would have made an effort to bring him in myself as a witness.

Q. I see. Did you support Mr. Weisbart during the year of 1955?

A. Well, I'm sure that I supported him much, much more than is declared—shown by the statement, I am sure that it was more than half of his income.

* * * * *

On cross-examination, appellant testified that while he was held in the Los Angeles jail from January 25 to June 24, 1955, before being transferred to the Chino correctional institution (11 R. 1059, 1067), Weisbart worked for appellant as his legal runner (11 R. 1065), but that appellant filed no employer's withholding tax returns, because the relationship was simply "friendly" and not that of an employer-employee (11 R. 1066). Appellant said he gave Weisbart releases with which Weisbart obtained money for his personal family support from attorneys who, he testified, were holding the money for appellant. (11 R. 1059–1061, 1065.) Appellant acknowledged that when he was booked at the Los Angeles County Jail on January 25, 1955, after being returned from Texas, he had less than $100 to his credit at the jail. (11 R. 1059.) On cross-examination, appellant stated that it was false for him to represent in the 1955 tax

return that Weisbart lived in appellant's home only "if paying the rent is false," that he reported Weisbart had gross income under $600, because Weisbart told him he had no income, and that he felt his relationship with Weisbart justified his description of him on the tax return as "uncle." (11 R. 1068–1070.)

Lowell Lyons, Jr., 229 North Broadway, Los Angeles, was listed by appellant as his employer in 1955. (Ex. 1.) Mr. Lyons could not be found at the time of trial, despite a diligent search by the Intelligence Division of the Internal Revenue Service and by the United States Marshal. (11 R. 1158.) Exhibit 81 is a certificate of the District Director at Los Angeles, stating that no 1955 Employer's Quarterly Withholding Statement (Form No. 941), could be found for Lowell Lyons, Jr., at any address, and no such return could be found for 1953, 1954, 1955 or 1956. (11 R. 1138.) Mrs. Weisbart testified that her husband at one time worked for Mr. Lyons. (6 R. 170, 177.) Attorney Littlefield testified that Lowell Lyons, Jr., was in 1955, a Los Angeles attorney, and at one time an attorney for appellant. (6 R. 236.)

Los Angeles County Jail records (Ex. 78) showed that appellant was held there from January 25, 1955 until June 24, 1955, when he was released to the correctional institution at Chino, California, and that Lowell Lyons, Jr., was confined at the jail from April 11, 1955 to June 27, 1957. (6 R. 256–259.) California Department of Correction records (Ex. 63) show that appellant was received on June 24, 1955, and first paroled thereafter on May 4, 1959.

Appellant testified that $2,150.50 was paid to him in cash by Lowell Lyons, Jr., between January 1 and January 15, 1955, at which time, appellant left Los Angeles, and drove to Houston, Texas, and that this payment was for services rendered to Lyons in 1954, which included some undefined services in connection with a real estate transaction and legal briefing work performed for Lyons while appellant was in jail. (10 R. 1009; 11 R. 1056–1058.) Appellant did not remember his 1954 tax return or recall if Lyons gave him a withholding statement for 1954. (11 R. 1057–1058.) He stated on direct examination that he did not list Lyons on the employment history form he filled out in prison, because he was actually self employed and

it was not good policy to list an employer who had a jail record. (10 R. 1042–1043; 11 R. 1079.)

Appellant testified on direct examination that a withholding statement (Form W–2), which showed $473.11 withheld in taxes, was furnished to him by Mr. Lyons or his office. (10 R. 1009–1011.) On cross-examination, he stated he was not positive that he ever had a Form W–2 (11 R. 1191) and that he believes he did not have a Form W–2 (11 R. 1200), and that an entry in his prison mail record for an outgoing mail item addressed to the District Director at San Francisco on March 13, 1956, was a letter explaining the absence of a Form W–2 (10 R. 1011; 11 R. 1197, 1200–1201). He also testified his 1955 deductions would have procured his tax refund, but that the required "long form" tax return was not available at the prison. (11 R. 1075–1076.)

SUMMARY OF ARGUMENT

I

The evidence amply established that appellant's 1955 tax return was mailed to, received at and processed by the District Director of Internal Revenue at San Francisco and that a tax refund check was issued there and mailed to appellant, and venue was therefore established in the Northern District of California, Southern Division.

II

Denial of further continuance was no abuse of discretion, and did not cause prejudice to appellant.

III

The falsity of the 1955 return was amply established in that the jury reasonably could believe appellant did not receive $2,150.50 in wages, that no taxes were withheld, and that he was not entitled to claim exemptions for a wife and an uncle.

IV

No attorney-client privilege attached to appellant's correspondence in which he instructed Los Angeles attorney Little-

field to procure endorsements on appellant's 1955 tax refund check, nor was appellant denied any right to pre-trial discovery and inspection of this correspondence.

V

Appellant's sentence was clearly intended to start after he served his California State Prison sentence and California did not relinquish its right to require completion of the state sentence by releasing appellant to the United States District Court for prosecution.

VI

Co-defendant Davenport's guilty plea did not prejudice appellant and he was not improperly denied severance.

VII

Appellant has not been prejudiced on appeal by deprivation of an adequate record.

ARGUMENT

I. Venue was established in the Northern District of California, Southern Division, and the jury were properly instructed on this topic

The facts recited clearly establish that taxpayer's return was filed and processed in San Francisco,[4] and that the refund check was issued there and mailed to appellant at Folsom Prison, where he received it. Thus, the false document was "used" at San Francisco by appellant as charged in Count I of the indictment, which avoided the usual conjunctive charge that the document was "made and used" in violation of 18 U.S.C., Section 1001, for reasons best known to the draftsman, who

[4] Although the representative of the San Francisco District Director could not testify whether Exhibit 1 was received by mail or personal delivery (6 R. 290–293), appellant testified that his 1955 tax return was mailed through the education office at Folsom Prison. (12 R. 1200–1201.) While appellant testified that he mailed Exhibit 1 to Los Angeles, an item of outgoing mail recorded in his prison mail register showed that on March 13, 1960, he mailed a communication to the District Director at San Francisco, which appellant explained was a "letter" explaining the absence of a Form W–2.

may have had a speculative eye on *United States* v. *Valenti*, 207 F. 2d 242 (C.A. 3d), decided in 1953, later approved in *Travis* v. *United States*, 364 U.S. 631, decided January 16, 1961, both of which held that the place of filing was the only proper venue in which to prosecute for a false non-Communist affidavit filed by labor union officers. The latter case was proceeding through the courts when the indictment was returned. Or possibly, the draftsman had in mind *United States* v. *Buchanan*, 238 Fed. 877 (N.D. Calif., 1917), holding that where travel and subsistence allowances were obtained from the Government by false statements, the offense of converting Government property to defendant's use was committed at the place where the false statements were made. As his 1955 tax return was shown to be a false document, there is no merit in appellant's contention (Br. 48) that the District Court's instruction to the jury was erroneous in stating that filing a tax return could be a basis for finding that part of the offense was committed in San Francisco.[5] Nor was exception taken before the jury retired, or thereafter to this charge, as required by Federal Rules of Criminal Procedure, Rule 30.

The tax refund check being issued and mailed to appellant from San Francisco, this established venue there for the violation of 18 U.S.C., Section 641, by stealing and converting to his own use property of the United States worth more than $100. The words "steal" and "stolen" are not words of fixed common law meaning and have been interpreted to include misappropriation by false pretenses and embezzlement.

[5] The charge of the court as to venue was as follows (13 R. 1323):

"You will notice that the indictment charges that the offenses referred to were committed in San Francisco. It is necessary for the prosecution to prove the venue as thus alleged.

"Now, as to each of the substantive counts, that is, the counts except the conspiracy count, that is, the counts charging use of a false document and charging theft by false pretenses and charging false claims for refunds to be filed, it would be sufficient if you find that the defendant committed any part of these respective offenses in San Francisco as by causing a tax return to be filed there, or by aiding and abetting in the preparation or signing of a tax return there filed. As to the conspiracy charge it would be sufficient if you find that any one of the overt acts charged in the indictment with respect to the conspiracy was done or caused to be done in San Francisco."

United States v. *Turley*, 352 U.S. 407, 411; *Smith* v. *United States*, 233 F. 2d 744, 747 (C.A. 9th). Section 641 of Title 18 is intended to encompass not only common law larceny and embezzlement, but acts "which shade into those crimes, but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S. 246, 269. The false pretenses by which appellant secured the tax refund were made at San Francisco, in the return filed there, and his offense against Section 641 therefore was begun in the Northern District of California, even if it was completed at Los Angeles, where he caused the check to be negotiated. Prosecution in the Northern District of California was therefore proper. 18 U.S.C., Section 3237.[6]

Appellant, though he moved for severance and other relief, made no motion to transfer the trial to the Northern Division, but stood on his objection that he did not consent to trial in the Southern Division. (4 R. 71.) Interpreted as a motion to transfer, the foregoing objection was not timely under Federal Rules of Criminal Procedure, Rule 22, as on September 23, 1960, the court allowed appellant two weeks within which to make motions (1 Supp. R. 22, filed December 21, 1966) and

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[6] Section 3237 of Title 18 reads as follows:

"§ 3237. *Offenses begun in one district and completed in another.*

"(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

"(b) Notwithstanding subsection (a), where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of the Internal Revenue Code of 1954 (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

his objection to trial in San Francisco, was made on November 7, 1960 (4 R. 71).

II. Denial of continuance was a proper exercise of discretion

Appellee's short answer to appellant's complaint that he was deprived of the effective assistance of counsel because further continuance was denied is that appellant and his attorney were aware since 1958 that the subject matter of the indictment was under investigation, that appellant's attorney himself suggested November 7, 1960, as a firm trial date, that the District Court at no time receded from its clearly expressed view that the trial should proceed no later than November 7, 1960, that the court made available all discovery to which appellant was entitled and all assistance by way of subpoena and writs of habeas corpus ad testificandum, for which he made proper application, and that appellant had the benefit of every proper defense which he could muster and was not prejudiced by denial of a further continuance. The measures taken by the District Court to aid appellant in his trial preparation were truly extraordinary, but the court also properly weighed the interests of the other defendants and their counsel, the Government's preparation and readiness, and the legitimate interest of the court in maintaining its own calendar. Its action was a proper exercise of discretion and is not a reviewable matter. *Elkins* v. *United States,* 266 F. 2d 588, 595 (C.A. 9th), reversed on other grounds, 364 U.S. 206; *Shockley* v. *United States,* 166 F. 2d 704 (C.A. 9th), certiorari denied, 334 U.S. 850.

On November 7, 1960, an investigating agent testified on appellant's motion for a continuance that he first contacted appellant in July, 1958, at which time appellant refused to make a statement, and that appellant told the agents that Mr. Cragen was his attorney (5 R. 30–33), and Mr. Cragen stated in argument to the District Court that he was contacted by the agents in 1958 (4 R. 1–3). This witness also testified that in 1958, appellant filed a writ of habeas corpus ad prosequendum in the District Court demanding immediate prosecution (5 R. 30) and appellant testified at the trial that he did this to vindicate himself in the eyes of the California Adult Authority

(11 R. 1051). His petition and the order of the District Court denying the writ on August 22, 1958, was certified to this Court in the Supplemental Record filed here on September 8, 1966.

Mr. Cragen was appointed attorney for appellant on September 15, 1960 (2 R. 66) in Criminal No. 37418, which was superseded by the indictment in Criminal No. 37513, returned September 21, 1960, and this latter indictment is the basis of the conviction and appeal in this case. Mr. Cragen was appointed attorney for appellant in Criminal No. 37513 on September 22, 1960. (1 Supp. R. 6, filed December 21, 1966.) On September 23, 1960, Mr. Cragen objected to the October 10, 1960 trial date which had been set (2 Supp. R. 9, filed December 21, 1966), and stated that his first available trial date would be October 17, 1960 (*ibid*, p. 14) due to state court engagements. He stated that he wished to devote eight days to preparation (*ibid*) and stated "I would suggest that as a date certain, Your Honor, November 7." (*Ibid*, p. 15.) He stated "I could go to trial earlier than that, but I don't believe I could have the case prepared before that." (*Ibid*, p. 17.) The District Court stated it would "go along" but might advance the trial date if counsel for other defendants did not confirm the arrangement (*ibid*, p. 18), and the court stated "I am going to insist on performance" (*ibid*, p. 19). The court repeated that November 7 was the trial date for all defendants. (*Ibid*, p. 24.)

Thereafter, continuances were requested and denied by the pretrial judge on October 25, 1960 (2 Supp. R. 6, filed December 21, 1966), and again on November 4, 1960, when the court summarized his reasons to be (1) that appellant at his own request, had been maintained by court order in the San Francisco jail, rather than Folsom Prison since September, and that this procedure was "straining the notions of comity pretty hard," (2) that the court had to consider other contingencies in the case, such as maintaining troublesome prison convicts in the San Francisco Jail, and (3) other factors such as the court's calendar and the readiness of the Government to proceed. The court also noted the central role of appellant in the over-all conspiracy charges (4 R. 60–65).

Although Mr. Cragen protested in these hearings, and by affidavit filed November 4, 1960 (1 R. —) that he was not prepared to go to trial, there is no showing that any aspect of appellant's defense had to be neglected. The one persistent object of pretrial preparation stated by appellant and Mr. Cragen was to get prison records and prior statements of the prison convicts who were involved in the case (see motions filed October 24, 1960 and November 4, 1960, and 2 R. 5–14, 84–90; 3 R. 9–26, 33–34). The records shows that numerous subpoenas duces tecum and writs of habeas corpus ad testificandum were issued on behalf of appellant, and that the Folsom Prison education supervisor,[7] five prison inmates [8] and three jail inmates [9] were called as defense witnesses in addition to the five prison inmates [10] and two prison officers [11] called and cross-examined as Government witnesses. Professor Paul L. Kirk was also called as an expert handwriting witness for defendant at the Government's expense. (11 R. 1114.)

The trial judge also considered and denied a defense motion for continuance. (5 R. 8.) The Government's case began November 7, 1960, and occupied eight trial days. The defense was not required to proceed until November 21, 1960 (10 R. 911), and the case was not submitted to the jury until November 29, 1960 (13 R. 1336).

Appellant's guilt on Counts I and II seems entirely free from any doubt, and there is no suggestion of any defenses whatsoever to those counts which were left insufficiently developed. Appellant was not convicted on any of the other counts, which were the subject matter of the bulk of his pretrial motions.

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[7] Donald Moore (10 R. 962; 12 R. 1166).

[8] Manuel Escarrega (10 R. 931), Rudolph Holley (10 R. 938), LaVern Speer (10 R. 945), LeRoy Plummer (10 R. 955), and William Davenport (10 R. 983).

[9] Leonard Garbey (10 R. 912), Alan Dale (10 R. 919), and Richard Melander (10 R. 993).

[10] Richard Black (6 R. 298), Everett Nelson (7 R. 387; 9 R. 854), Gilbert Hayes (8 R. 555), Willie Davis (8 R. 586), and Elmer Tinsley (8 R. 598).

[11] Jack Stark, prison accounting officer (7 R. 342), and Dr. Herbert S. Singer, prison psychiatrist (8 R. 693).

III. Proof that the 1955 tax return was false was adequate to sustain the verdict

Appellant's attack on the sufficiency of the evidence to show that he is guilty (Br. 18–19) ignores both the charge and the proof. Whereas Counts I and II charged false representations as to (1) wages received, (2) taxes withheld, and (3) exemptions claimed, appellant addresses his contention only to the first item. Proof of falsity of any one item charged would sustain the guilty verdict. *Arena* v. *United States,* 226 F. 2d 227 (C.A. 9th), certiorari denied, 350 U.S. 954; *United States* v. *Otto,* 54 F. 2d 277 (C.A. 2d). That appellant was not entitled to exemptions for his divorced wife, Goldye Morgan, and his "uncle", Weisbart, is not even questioned in appellant's brief. Furthermore, appellant having testified and introduced other evidence in his own behalf, he waived the right to stand on his mid-trial motion for an acquittal, as the sufficiency of the evidence is now to be judged in the light of all evidence in the case, whether introduced by plaintiff or defendant. *United States* v. *Haskell,* 327 F. 2d 281, 283 (C.A. 2d), and the evidence is to be viewed in the light most favorable to the Government. *Young* v. *United States,* 298 F. 2d 108, 111 (C.A. 9th).

The evidence showed that during 1955, Lowell Lyons, Jr., was continually in jail after April 11, 1955, and appellant himself was continually in jail after January 25, 1955. He had left California for Houston, Texas, on January 12 or 15, 1955. In July, 1955, he filled out an employment history form for the prison authorities which did not list Lyons as an employer. Mrs. Weisbart did not testify that her own husband worked for Lyons in 1955, as appellant represents (Br. 19), but that he had worked for Lyons at an unspecified time, so that there was substantial probative force to the fact that the Los Angeles District Director's office had no record of Lyons having filed an employer's quarterly withholding return (Form No. 941) for 1953 to 1956, inclusive.

The jury had ample reason to disbelieve appellant's trial testimony that Lyons paid him $2,150.50 in cash in Lyon's office early in January, 1955. Appellant's credibility was subjected to severe strains in the matter of, *inter alia,* the Form W–2 which he both asserted and denied he had received from Lyons, in the

matter of where he mailed his tax return (in view of the entry in his prison mail register showing a communication mailed to the San Francisco District Director's office on March 13, 1956), in the matter of his divorced wife and his "uncle" Weisbart, and in the matter of the numerous gifts of money he allegedly made to Weisbart while in the Los Angeles Jail, despite the fact that he had less than $100 when booked at the jail on January 25, 1955. There was also the matter of the completely dishonest means by which he exploited the services of Los Angeles attorney Littlefield to procure the forgery of his divorced wife's endorsement on the tax refund check, Exhibit 2.

Judged most favorably to the Government, as it must be in this posture of the case, the evidence amply permitted the jury to find appellant received no wages from Lowell Lyons in 1955.

Appellant's additional contention (Br. 46) that "he is blameless for the amount refunded to him" because he left it to the Internal Revenue Service to determine his tax, ignores the specific charge in Court I that he *used* a false document. Appellant was not charged under 18 U.S.C., Section 287 with presenting a false claim against the United States, so that it is not necessary to consider this ingenuous argument. However, it may be noted that the test of a false document under 18 U.S.C. Sec. 1001 is whether it is calculated to or intrinsically capable of inducing agency action. *Brandow* v. *United States* (C.A. 9th), 268 F. 2d 559, 565. It is not even necessary that the Government actually rely upon, or suffer a loss from, the false document. *Morgan* v. *United States,* 301 F. 2d 272, 275 (C.A. 9th); *Blake* v. *United States,* 323 F. 2d 245, 247 (C.A. 8th).

Furthermore, as the sentences on Counts I and II were wholly concurrent and no fine is involved, either Count will support the conviction. *Beck* v. *United States,* 298 F. 2d 622, 626, (C.A. 9th), certiorari denied, 370 U.S. 919.

IV. Appellant's letters (Exs. 7 and 11) to attorney Littlefield were not privileged nor was he contumaciously denied pretrial production thereof by the government

There is no merit to appellant's contention (Br. 20–24) that Plaintiff's Exhibits 7 and 11, being appellant's letters to at-

torney Littlefield transmitting the tax refund check with instructions for getting it endorsed, were subject to the attorney-client privilege and were withheld from him prior to trial in violation of an alleged court order for production and discovery.

Although appellant testified he considered the letters were "highly confidential" (6 R. 212), the facts previously stated show that they were not written to secure legal advice and that Littlefield was not employed to render any advice or assistance to appellant with regard to his 1955 tax return or his rights in or to the tax refund check. The District Court (6 R. 210) correctly relied on *Olender* v. *United States,* 210 F. 2d 795, 806 (C.A. 9th), which states:

> We think the ruling of the trial court was correct. The attorney-client privilege is limited to communications made in the course of seeking *legal advice* from a professional legal adviser *in his capacity as such.* 8 Wigmore on Evidence, § 2294. Thus, communications to an attorney in the course of seeking business rather than legal advice are not privileged, *United States* v. *Vehicular Parking,* D.C. D. Del., 52 F. Supp. 751; nor are communications to an attorney who acts simply as a scrivener of deeds, or who simply deposits money in a bank for his client. *Pollock* v. *United States,* 5 Cir., 202 F. 2d 281. Coming a bit closer to the instant case, the privilege has been held inapplicable to communications to one who was both an attorney and accountant where made solely to enable the practitioner to audit the client's books, *In re Fisher,* D.C. S.D. N.Y., 51 F. 2d 424; or to simply prepare a federal income tax return. *Clayton* v. *Canada,* Tex. Civ. App. 223 S.W. 2d 264; see also *United States* v. *Chin Lim Mow, supra.*

The District Court also correctly denied (6 R. 220) appellant's motion to quash Exhibits 7 and 11 (6 R. 217). This motion was made on the ground the pretrial judge had ordered the government to allow inspection "of all items which were to be used in evidence as against defendant Morgan which were claimed to be those of defendant Morgan's." Appellant's written motion for discovery (1 R. —) was filed on October 24, 1960 and demanded

> "a copy of all statements, records, affidavits, reports, documents, letters, files, opinions and data on file or in possession of the United States Attorney or under his control which pertains to the cause of *United States* v. *Morgan, et al,* and as to each and every co-defendant and co-conspirator * * *"

On November 1, 1960, the pretrial judge ruled as follows on this motion (3 R. 26):

> "Well, as I see it, without prejudice, I am going to deny this motion except to the extent that the United States will make available for Morgan or his inspection anything that they claim they took from him; and they should be made open to him for his inspection and copying, if necessary. Now, if I have left out anything, I will simply say to you that I would like to hear a separate motion specifying what you want in terms of some degree of certainty or some degree of specificity—that's a mouthful—and then I will pass upon it. I am not going to decide this to your prejudice other than to permit that—I am going to deny the motion as it stands now without prejudice.
>
> Now, does that answer your question?
>
> Mr. Cragen, yes, Your Honor."

On November 4, 1960, the pretrial judge restated his order to be as follows (4 R. 38):

> "* * * as to those documents which the Government claims were prepared and filed with the Government by the defendant, that he ought to see them. As to others, no. Because unless they were seized from the other person by some sort of process or taken in some sort of a search which was adverse * * *

The District Court stated its order for production by the government covered appellant's tax returns because "they are documents that came into the hands of the Government by the ordinary process of business." (4 R. 38). Again, the Court restated its views to be that the government should let the defendant see documents "that you claim belong to him", but that as to other documents, the defendant had to comply with the

rule "of showing that they were seized by some sort of process from the other person or taken in some sort of adversary type of transaction." (4 R. 39).

Exhibits 7 and 11, having been written to and produced at the trial by attorney Littlefield, were obviously not "obtained from or belonging to the defendant or obtained from others by seizure or process" within the meaning of Rule 16 of the Federal Rules of Criminal Procedure (prior to 1966 amendments), and the District Court's orders accordingly excluded them from the discovery order.

Finally, these documents were admittedly exhibited to defense counsel a day in advance of their offer in evidence. (6 R. 220). They are simple documents written by appellant himself and of which he was completely aware. His testimony exhibited complete knowledge of them and there is no suggestion of any additional defense measures which might have been taken with regard to them.

V. The comity practiced in this case between the State and Federal Governments demonstrates an intent to return appellant to the state authorities to complete service of his state sentence and to make his federal sentence operative only thereafter

Appellant's proposition No. V is an argument that his delivery by the Warden of Folsom Prison on September 9, 1960, to the United States Marshall pursuant to a writ of habeas corpus ad prosequendum, issued by the District Court, amounted to a complete relinquishment of jurisdiction by the State of California to the Federal Government. This thesis is predicated on the assumption that the issuance of a writ of habeas corpus ad prosequendum at the application of the federal prosecutor is not an authorized procedure, that the transfer was simply a matter of voluntary cooperation by the California authorities, and that their action constituted, in effect, a commutation of the state prison sentence because the wording of the writ stated that after the prisoner had been produced for arraignment, the Warden should "abide by such order of the above-entitled Court as shall thereafter be made concerning the custody of said prisoner," and the District Court implemented this phrase by

ordering that appellant not be returned to the state prison pending trial but instead be kept in the San Francisco jail. From these premises, appellant contends two consequences necessarily follow: (1) that he became entitled to and was erroneously denied bail prior to trial, and (2) that the state prison sentence was immediately terminated and the subsequent five-year (concurrent) federal sentences started to run when they were pronounced on December 22, 1960, and have now expired.

A review of the pertinent facts shows that no commutation of sentence was intended or effected, and that the federal sentence was not ordered to, was not intended to, and could not legally have commenced to run until appellant finished serving his state prison sentence, after which he elected not to begin service of the federal sentence imposed in this case.[12]

The first writ[13] of habeas corpus and prosequendum was dated September 8, 1960,[14] and issued to bring appellant before the Court for arraignment on the indictment in Criminal No. 37418, which preceded indictment No. 37513. The application for the writ was signed by Assistant United States Attorney Schnake on September 8, 1960. The body of the writ read as follows:

> WE COMMAND that you have and produce the body of ROBERT E. MORGAN, alias Leroy Frank Holman—A–33442, in your custody in the hereinabove-mentioned institution, before the United States District Court, in and for the Northern District of California, Southern Division, on September 9, 1960, at 9:30 a.m., in order that said prisoner may then and there appear for arraignment upon the charges heretofore

[12] The election is recited in the memorandum opinion of the District Court dated May 17, 1965, and certified to this Court by Supplemental Record filed June 4, 1965.

[13] A second writ dated January 17, 1961, to the Warden required production for arraignment on February 6, 1961, and the Marshals return thereon shows production and return to custody on that day. (Supplemental Record filed September 8, 1966). Docket entries show that on February 6, 1961, Counts III and VI were dismissed.

[14] On January 30, 1967, appellee furnished the Clerk of this Court two certified copies of the writ dated September 8, 1960.

> filed against him in the above-entitled Court, and that immediately after said arraignment to return him forthwith to the said hereinabove-mentioned institution, or to abide by such order of the above-entitled Court as shall thereafter be made concerning the custody of said prisoner.

When arraigned on September 9, 1960, appellant asked the Court to restrain the state authorities from returning him to San Quentin Prison because he would be put in isolation and hampered in preparing his defense and conferring with his attorney, Mr. Cragen. Appellant said the prison authorities intended to "suppress" him because he was going to disclose to the Court certain crimes in which the prison officials were involved. The Court ordered the Warden to return appellant to Court on September 15, 1960, for hearing on this Motion. (2 R. 6–15).

On September 15, 1960, extensive argument and colloquy was had on this motion. (2 R. 3–82). The Court finally stated its decision would be as follows (2 R. 82):

> Well, then, we are all in agreement, if you don't disagree with that. Then that will be my order, that he be taken into custody by the Marshal and placed in confinement and placed in county jail No. 1 for keeping until his trial has been concluded, at which time he will be returned to the custody of the Warden of San Quentin Prison for service of the state sentence.

Appellant sought, unsuccessfully, to have the District Court admit him to bail on the federal indictment, as appellant felt he could then attack the validity of the state conviction directly because it would be the only remaining basis for a denial of bail by the District Court. (2 R. 12). Appellant acknowledged to the District Court that he knew and accepted the fact that he would be serving "dead time" while confined in the San Francisco jail. (Ibid, pp. 73, 80.)

In a further hearing on September 23, 1960, bail of $2,000 was set by the District Court and the Court asserted that appellant, though in the San Francisco county jail, "will be in state custody," and appellant again acknowledged he knew he

was doing "dead time." (1 Supp. R. 22–23, 25–28, filed December 21, 1966).

On October 25, 1960, a further hearing was held on various Motions of appellant. (2 Supp. R. 2–30, filed December 21, 1966). Appellant had been transferred to the Alameda county jail because he was dissatisfied with restrictions on his trial preparation at the San Francisco county jail. (Ibid, p. 5.) Appellant contended he was entitled to be admitted to bail on the federal charge, and complained that the State would not place a "hold" against him. (Ibid, p. 16.) The Court's views were expressed as follows:

> But assuming he put up bail without a hold, I think the State authorities could pick him up, because I don't think that under my writ of habeas corpus—well, he's bailable. The writ of habeas corpus doesn't direct that he be permitted to be at large. The habeas corpus is ad prosequendum." (Ibid, p. 17.)
>
> I think under the comity provisions, this Court is duty-bound to let him finish his state time. He is serving dead time so far as the state is concerned, because he's asked to be taken out of state custody while he's going through this preparation, and he has been very frank to admit that. (Ibid, p. 18.)
>
> I think the state has acceded to that extent to the federal jurisdiction, but only to the extent of being tried by federal jurisdiction for the federal crime. And when that act has been concluded, the prosecuting, whether successful or unsuccessful, he must be returned. And in the meantime, he is a custodial problem of the Federal Government, subject to being returned to the State at any time this matter is terminated. (Ibid, p. 20).
>
> As a matter of fact, I am inclined to think that under these circumstances, I could probably hold this man without bail. (Ibid, p. 21.)
>
> * * * you are going to be returned whether you are guilty or not guilty, it makes no difference as far as that is concerned. You are going to be returned to state authorities for service of your state sentence, and you can challenge that any place you want to in accordance

with the jurisdiction of the Courts involved. (Ibid, p. 23.)

* * * I do not deem that we have any jurisdiction over this man except for prosecuting. We don't have a jurisdiction to let him go out on the street and we don't have any jurisdiction to do anything else except to prosecute him for the federal offense in which he is involved. (Ibid, p. 27.)

On October 31, 1960, a hearing was held (3 R. 2–48), on the Court's Order against state authorities to show cause why they should not be restrained from interfering with appellant's posting bond and from rearresting him thereafter. Appellant's attorney argued that after the San Quentin Warden, pursuant to the writ, surrendered appellant to the United States Marshall, then the question of comity "goes out the window" because appellant was solely in the custody of the United States Marshal and the state allegedly acknowledged this by not placing a hold against appellant or giving him credit on his sentence. (Ibid, pp. 8–15.) A California Assistant Attorney General, Mr. McEnerney, appearing for the state authorities, informed the Court that (Ibid, p. 7): "If I were asked for advice, I would tell the state authorities to rearrest Mr. Morgan upon bail." Mr. McEnerney also stated that the release by the California authorities was "conditional" on exercise of adequate control by the Federal Court, and protested that the District Court, by admitting appellant to bail, would in effect be granting relief to appellant equivalent to habeas corpus on his state conviction, on which appellant was not eligible for bail. Mr. McEnerney also noted that he had never heard of a state prisoner being denied credit toward his sentence for time served unless he himself effected his absence, as by escape. (Ibid, p. 31.)

The Court then signed an Order which (1) ordered the United States Marshal to produce appellant before the United States Commissioner for tendering bail, (2) refused to grant an injunction forbidding the state authorities from assuming custody of appellant should he be released on bail, and (3) ordered the United States Marshal to maintain custody as before. (Ibid, p. 48). A written Order to this effect was thereupon

signed by the Court and filed on October 31, 1960. (1 R. —).

On November 4, 1960, in a further hearing (4 R. 1–90) the District Court restated its Order to be that the United States Marshal "maintains the custody of the defendant as heretofore" and the Court stated:

> In other words, I am telling you so there won't be any misunderstanding about it, that I am telling the Marshal not to put this man at large on bail, because he is a prisoner of the State of California that we have taken out of the custody of the state by writ of habeas corpus ad prosequendum, and even though the United States has suggested that I fix thereon $5,000 and I have * * * I am telling him why the offense is not bailable, he is not bailable. He is a prisoner and we are not going to turn him loose out on the street.
>
> Now, if you want to appeal that, go to it; I don't care. And so, I am just telling the United States Marshal, you can make your record, to take him over and let him put up his bail, * * * but I am telling the Marshal to hold him in custody.
>
> (4 R. 47).

The facts stated establish clearly that the District Court, in issuing the writ of habeas corpus ad prosequendum, exercised its powers subject to the continuing right of the California authorities to receive back the prisoner once the federal prosecution was concluded. The California authorities just as clearly asserted this right and very properly objected to any action by the federal authorities which would jeopardize the security of the prisoner's custody. It may be doubted that a workable comity in this field could be maintained without such mutual respect between the respective Governments.

A. The authority of the District Court to issue the writ of habeas corpus under 28 U.S.C., Section 2241 can hardly be questioned since *Carbo* v. *United States*, 364 U.S. 611, affirming 277 F. 2d 433 (C.A. 9th). It should be noted that in *Carbo*, although the prisoner contested the issuance of the writ, the

Court approved its use, thus answering appellant's argument that this writ can be issued only at the instance of a prisoner.

It has always been recognized that despite its nominal similarity to the "Great Writ" (habeas corpus ad subjiciendum), compliance with the writ ad prosequendum by the parasovereign to whom it is addressed is entirely discretionary. *United States ex rel Moses* v. *Kipp,* 232 F. 2d 147, 150 (C.A. 7th); *Lunsford* v. *Hudspeth,* 126 F. 2d 653 (C.A. 10th). Furthermore, the prisoner "has no standing to raise the question of comity between two sovereign states. He cannot urge priority of one over the other." *Ramsey* v. *United States,* 248 F. 2d 532, 533 (C.A. 9th). (Defendant not entitled to vacate federal sentence imposed after California prison authorities released prisoner for federal prosecution.) See also, *Strand* v. *Schmittroth,* 251 F. 2d 590 (C.A. 9th), appeal dismissed, 355 U.S. 886.

B. Appellant's contention that he should have been admitted to bail by the District Court suggests these questions: (1) has he waived the right to complain of denial of bail; (2) was he entitled to be admitted to bail in such circumstances; (3) was he prejudiced by the denial of bail?

1. The District Court, in denying bail, informed appellant of his right to appeal, of which appellant did not avail himself at that time. The remedy for improper denial of bail is to exercise the right to appeal forthwith if it is denied by the District Court. *Ellis* v. *Chappell,* 230 F. Supp. 164, 167 (D.C.D.C.)

2. The right to bail pending trial as provided in the Eighth Amendment is not without limitation. *Carlson* v. *Landon,* 342 U.S. 524, 545 (Congress may forbid bail for aliens awaiting a hearing on deportation charges).

Appellant was a prisoner serving a state prison sentence pursuant to a final judgment. There can, therefore, be no point to discussing the recent development of more liberal rules for bail pending appeal.

Where a federal prisoner serving a prison sentence is indicted on new charges, he is not entitled to be admitted to bail for the purpose of preparing his defense. *Minker* v. *United States,* 326 F. 2d 411 (C.A. 3d). Nor is an escaped state con-

vict, when retaken, entitled to bail because of new charges. *Davis* v. *North Carolina*, 339 F. 2d 770, 777 (C.A. 4th), reversed on other grounds, 384 U.S. 737. If these cases are sound law, they apply a fortiori to the question of bail for a prisoner held for prosecution by the Federal Government by courtesy and consent of the state government, and the District Court was entirely right in concluding that appellant was not bailable in these circumstances.

3. As the California authorities informed the District Court they would re-arrest appellant instantly should he be admitted to bail, appellant has not been prejudiced by denial of bail. His conditions of confinement thereafter would doubtless have been much more rigorous than confinement in the San Francisco or Alameda County jails.

C. The District Court, in its opinion of May 17, 1965, correctly rules that appellant's federal sentence did not, was not intended to, and could not legally have commenced to run when he was sentenced on December 22, 1960, or when he was thereafter produced in federal courts on February 6, 1960, and September 24, 1962, pursuant to writs of habeas corpus ad prosequendum.

First in importance is that 18 U.S.C., Section 3568 provides for computation of service of sentence in the following terms:

> § 3568. *Effective date of sentence; credit for time in custody prior to the imposition of sentence.*
>
> The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided,* That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.
>
> If any such person shall be committed to a jail or other place of detention to await transportation to the

> place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term.

In *Larios* v. *Madigan*, 299 F. 2d 98 (C.A. 9th), this Court held that even where the federal sentence did not specify whether or not it was concurrent or consecutive, the federal sentence started to run for a California state prisoner only after he was released from service of the state sentence and received for transportation to the place designated by the Attorney General for service of federal sentence.

The sentence of the District Court clearly means it was not to start to run until California had released appellant from his state sentence. It is not vague or ambiguous if construed reasonably as it should be. *McNealy* v. *Johnson, Warden,* 100 F. 2d 280, 282 (C.A. 9th). Indeed, it has been declared to be the duty of a federal court, lacking clear consent by the state authorities to immediate execution of the federal sentence (*Stamphill* v. *United States,* 135 F. 2d 177, 178 (C.A. 10th))—

> to provide that its sentence shall begin at the expiration of the sentence of the state, and immediately upon imposition of such sentence to return him to the state penitentiary or other institution whence he came pursuant to the writ of habeas corpus ad prosequendum.

It has also been held that a federal sentence ordered by the court to run concurrently with a state sentence then being served is void. *United States* v. *Hough,* 157 F. Supp. 771, 777 (S.D. Calif.).

According to the recital on page three (3) of the opinion of the District Court dated May 17, 1965, appellant completed service of his state sentence and was released on February 15, 1965, by the California authorities to the United States Marshal to commence service of the sentence here involved. (Supp. R. filed June 4, 1965.) He thereupon elected not to serve this sentence. (*Ibid.*)

The District Court judgment provided that appellant's sentence—

> will commence at the expiration of such confinement by any parole or release from such confinement, conditional or otherwise.

It may be that this wording was chosen with an eye to avoid the result in *Johnson, Warden* v. *Wright,* 137 F. 2d 914 (C.A. 9th), where it was held that a federal sentence framed "to begin upon the expiration of the sentences which the defendants are now serving in the Southern Illinois Penitentiary" did not become effective upon the parole of the state prisoner, and that the prisoner was therefore entitled to release from federal custody.[15] At all events, it is clear that it was not intended to commence whenever appellant was temporarily removed to the federal courts for further criminal proceedings.

The contention that California abandons jurisdiction over its prisoners by turning them over to the Federal Government for prosecution is not new and has been raised and rejected in the state courts. *People* v. *Stoliker,* 192 Cal. App. 2d 263, 13 Cal. Rptr. 437. This Court has held the converse, i.e., that the Federal Government does not lose jurisdiction when the federal court allows a convicted prisoner to be taken and tried in a state court. *Sichofsky* v. *United States,* 277 Fed. 762, 765 (C.A. 9th).

VI. Co-defendant Davenport's entry of a plea of guilty caused no prejudice to appellant, and there was no error in denying a severance prior to trial

A. Co-defendant Davenport pleaded guilty to Count VII on November 9, 1960, the third day of trial. (7 R. 321). Davenport thereafter appeared as a defense witness, and testified on direct examination that he had never had any conversation with appellant about preparing tax returns. (10 R. 985). He was cross-examined whether he remembered telling the investigating agents on August 22, 1958, that appellant made out a 1955 tax return in the name of W. H. Reith, which Davenport admittedly signed and which

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[15] Thereafter, Wright's Illinois sentence was completely terminated and he was again taken into federal custody. *United States* v. *Wright,* 56 F. Supp. 489 (E.D. Ill.). In *Hunter, Warden* v. *Martin,* 334 U.S. 302, it was held that state parole was an expiration of the state sentence adequate to activate a similar federal sentence.

is specified in Count 4 as an overt act. After reviewing his question and answer statement, he stated "I still don't believe I told them definitely Morgan made the return out." (10 R. 988–990). He also testified that he could not "involve anybody in anything" and would not make a statement in court even if he knew who signed the Reith return, because of what might happen to him in prison. (10 R. 991–993). Having sought to benefit by Davenport's broad denial of discussing preparation of tax returns with appellant, he can hardly complain of this cross-examination.

When Davenport entered a guilty plea, appellant personally asked for a mistrial on the ground that the prosecutor contrived with government agents to hold Davenport's wife in the corridor while Davenport was taken by in her presence, all to the end of causing Davenport such emotional stress as to induce him to plead guilty. (7 R. 325). The prosecutor stated that, to the contrary, he had tried, unsuccessfully, to have the Marshal delay removing Davenport from the courtroom to avoid such a confrontation with the wife, who feared her husband. (7 R. 327). Appellant claimed the jury witnessed this confrontation (7 R. 331), but the bailiff informed the court that he escorted the jurors out and they were not present. (7 R. 332.)

The court denied the mistrial, and thereafter charged the jury that they should draw no inferences from the fact Davenport was no longer on trial, but should judge the evidence against each defendant separately. The jury were also admonished to read no newspaper accounts of the trial or any matters connected with it. (7 R. 334–336).

B. The joinder of appellant in this twelve count indictment was entirely proper under Federal Criminal Rule 8.[16] Appel-

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[16] "Rule 8. Joinder of Offenses and of Defendants.

"(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions con-

lant was involved personally with each of the twelve counts. Even in the counts in which he was not named as a defendant, Nos. VII, VIII, X, and XII, the tax return involved was one of the false returns identified as overt acts in Count III. This is thus clearly a case where joinder as to appellant was justified, not only under Rule 8(a) but under Rule 8(b). *Schaffer* v. *United States*, 362 U.S. 511. As the various substantive offenses were easily compartmentalized and the jury refused to convict appellant on the conspiracy, it can be seen that the refusal of severance was no abuse of discretion, even overlooking appellant's failure to renew a demand after Davenport pleaded guilty. *Fernandez* v. *United States*, 329 F. 2d 899, 905, certiorari denied, 379 U.S. 832.

Counts IX, X, XI, and XII, involving appellant with the tax returns of co-defendant's Escarrega and Holley were completely severed on November 7, 1960, although the returns there involved were also overt acts in Count III.

The "good faith" of the prosecution in charging appellant on the general conspiracy is amply shown in that handwriting evidence linked him to the 1955 Hayes tax return signature (9 R. 777–778), and one Nelson, a former Folsom inmate, testified that appellant, variously, prepared returns, altered authentic Forms W–2, added fictitious dependants, or supplied blank Forms W–2, for the numerous tax returns specified as overt acts in Count III. Nelson, specifically, named appellant in connection with the following returns:

Exhibit No.	Taxpayer	Record reference
19	Nelson	7 R. 389
21	Baker	7 R. 404
23	Hayes	7 R. 414
25	Black	7 R. 425
29	Tinsley	7 R. 437
3	Escarrega	7 R. 460
5	Holley	7 R. 465

stituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

VII. Appellant has been supplied all assistance necessary and pertinent to the issues raised in his appeal

Appellant's complaint of deprivation of an adequate record on appeal can only be met by comparing the record on file with the Clerk of this Court with appellant's motions to supplement the record as made on July 13, 1961 and June 28, 1965:

Appellant's motion for:	Record on appeal:
1. Reporter's transcript of oral proceedings for September 22, 1960 and September 23, 1960	Filed with Supplemental Record of December 21, 1966.
2. All Government exhibits	Contains all Government exhibits which were introduced in evidence, except the following: No. 3. Escarrega tax return—1957 No. 4. Escarrega tax refund check—1957 No. 6. Holley tax refund check—1957 No. 29. Tinsley 1956 tax return No. 90. Appellant's prison correspondence record.
3. All defendant's exhibit	Are in record on appeal, except for Defendant's Exhibit J, which was not received in evidence.
4. All written motions filed	On file in record on appeal.
5. All exhibits pertaining to Counts I and II	All defendant's exhibits are on file except No. J, which was not received in evidence. Government exhibits pertaining to Counts I and II which were received in evidence were Nos. 1, 2, 7, 10, 11, 12, 13, 14, 35, 36, 37, 63, 64, 65, 78, 79, 81, 84, 87, 88, 89, 90 and 91. All of these are in the record on appeal except No. 90, as explained above.
6. September 8, 1960, writ of habeas corpus ad prosequendum	Supplied on January 30, 1967 by appellee. This writ was not part of the record in this case, but in a preceding indictment.

Appellant's motion for:	Record on appeal:
7. September 15, 1960, writ of habeas corpus ad prosequendum	No such writ discoverable. On September 9, 1960, the District Court ordered the Warden to produce appellant again on September 15, 1960, which would indicate no writ was necessary or issued.
8. February 6, 1961, writ of habeas corpus ad prose-quendum	No such writ issued. This was the return date for the writ issued January 17, 1961, which is in the record on appeal.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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FEBRUARY 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967.

_____,
Attorney.

APPENDIX A

Exhibits

FOR THE PLAINTIFFS

	Ident.	Evid.
1. Income Tax Return for 1955—Morgan	145	234
2. Treasury Check, Robert Morgan	145	228
3. Income Tax Return M. A. Escarrega	146	653
4. Treasury Check, M. A. Escarrega	148	653
5. Income Tax return R. V. Holley	148	653
6. Treasury Check R. V. Holley	149	653
7. Letter to Littlefield 8/7/56	150	222
8. Photo—Escarrega	179	866
9. Photo—Holley	179	866
10. Divorce Decree, Goldye v. Robert Morgan	---	187
11. Letter to Littlefield 8/28/56	216	228
12. Card for Rec. & Ident. Sect. L.A. Sheriffs	247	251
13. Finger Print Card, FBI, Robert Morgan	253	255
14. Finger print card Sheriff's Office, L.A., Robert Morgan	267	273
15. Income Tax return 1955 W. H. Reith & Attach	274	867
16. Income tax ret. 1955 W. H. & Nellie Reith	277	867
17. U.S. Treas. Check $131.13, 12/16/57	278	867
18. Income Tax Return James King 1956	278	----
19. 1955 Income Tax Return of E. C. Nelson	282	394
20. Treasury Check, E. C. Nelson	282	395
21. 1955 Income Tax Return J. W. Baker	283	408
22. Treasury Check, John W. Baker	283	409
23. 1956 Income Tax Return, Gilbert Hayes	284	418
24. Treasury Check, Gilbert Hayes	284	422
25. 1956 Income Tax Return Richard Black	286	431
26. Treasury Check Richard Black	286	432
27. Income Tax Return W. A. Davis	287	1263
28. Treasury Check W. A. Davis	287	----
29. 1956 Income Tax Return E. R. Tinsley	289	454
30. Treasury Check, E. R. Tinsley	289	455
31. 1955 Income Tax return Gilbert Hayes	290	869
32. Treasury Check Gilbert Hayes	290	869
33. Photo E. C. Nelson	----	423
34. Recorded Statement, R. W. Black	311	----
35. Application for Mail & Visiting	344	348
36. Trust Ledger Robert Morgan	352	870
37. Trust Receipt	355	357
38. Trust Ledger, James King	358	----
39. Trust Receipt, King	359	----
40. Trust Ledger, Nelson	363	396

FOR THE PLAINTIFFS

	Ident.	*Evid.*
41. Trust receipt, Nelson	----	396
42. Trust Ledger, John Baker	366	413
43. Trust Receipt, John Baker	367	413
44. Trust Ledger, Gilbert Hayes	368	420
45. Trust receipt, G. Hayes	368	420
46. Trust receipt, G. Hayes	369	----
47. Trust Ledger, Richard Black	369	432
48. Trust receipt, Richard Black	370	432
49. Trust Ledger, Willie Davis	371	----
50. Trust receipt, Willie Davis	371	----
51. Trust Ledger E. R. Tinsley	372	455
52. Trust Receipt, E. R. Tinsley	372	455
53. Trust Ledger, Holley	373	654
54. Trust Receipt, Holley	373	654
55. Trust Ledger, Escarrega	374	654
56. Trust Receipt, Escarrega	374	654
57. Photo of Baker	403	409
58. Photo of Hayes	----	419
59. Photo of Black	425	872
60. Photo of King	449	----
61. Photo of Tinsley	----	456
62. Income Tax Return Steinhoff 1959	629	----
63. Cert. of period of confinement of defts	----	651
64. Morgan's Work History Questionnaire	----	874
65. Questionnaire, Morgan's Social History	704	----
66. Marital History of Morgan	708	----
67. Photostat of letter, Morgan, 8/28/56	721	----
68. Exemplar of Royal Typewriter	746	----
69. Exemplar of Royal Typewriter	747	----
70. Handwriting sample, D. Apple	750	884
71. Group of documents, Apple File	751	----
72. Handwriting sample, Paez	752	----
73. Handwriting sample, Nelson	752	837
74. Handwriting sample, Nelson	753	837
75. Handwriting sample, King	754	885
76. Handwriting sample, G. Hayes	754	838
77. Handwriting sample, Tinsley	755	838
78. Handwriting sample, Robert Morgan	761	763
79. Photostat	754	838
80. Exemplars	776	----
81. Tax papers, re Lowell Lyons	----	886
82. Yellow paper with writing	998	999
83. Page from Gov't Calendar	----	1095
84. Tax Return George Weisbart	----	1140
85. S.F. Sheriff's card	----	1145
86. Handwriting sample Melander	----	1147
87. Return processing index file	----	1152
88. CC of Social Sec. Records	----	1166
89. Classification Assignment card	1168	1172

FOR THE PLAINTIFFS

FOR THE DEFENDANT

U.S. GOVERNMENT PRINTING OFFICE: 1967